# Muhammad Isa bin Aris & Ors v Public Prosecutor

A

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO Q-05–123 OF 2009

B

ABDUL MALIK ISHAK, AZHAR MA'AH AND CLEMENT SKINNER JJCA

26 JANUARY 2011

C

*Criminal Procedure — Sentence — Appeal against sentence — Culpable homicide not amounting to murder — Appellants jointly assaulted deceased with pieces of wood — Whether jail terms against appellants should be reduced — Factors to be considered — Principles of sentencing — Whether child-offender appellant who delivered death blow should be sentenced differently from other adult appellants — Penal Code s 34*

D

All four appellants, who were initially charged with murder, had pleaded guilty in the High Court to an amended charge of committing culpable homicide not amounting to murder by causing a man's death. The court sentenced the first, third and fourth appellants to 18 years jail and the second appellant, a child offender, to 10 years jail. The second appellant was also ordered to be segregated from other adult prisoners pursuant to s 96(3) of the Child Act 2001. The appellants felt their sentences were excessive and appealed to the Court of Appeal for reduction. According to the facts of the case, the appellants, on the night in question, had consumed alcohol and were involved in a gang fight. They thought, mistakenly, that the deceased and his two friends, who were taking a short cut through a village on their way home, were from a rival gang who had attacked the appellants earlier. Armed with a piece of wood each, the appellants set upon the deceased and his friends. Only the deceased's friends managed to escape. The appellants pursued and severely beat up the deceased. The second appellant delivered the death blow to the deceased's head. At the time of the attack the ages of the first to the fourth appellants were respectively 18 1/2 years, 16 years 11 months, 19 1/2 years and 23 years 3 months.

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**Held**, allowing the appeals, reducing the sentences of the first, third and fourth appellants to 15 years jail from date of arrest, reducing the second appellant's sentence to 8 years jail from date of arrest and maintaining the High Court's order that he be segregated from other adult prisoners:

I

(1) The court took into consideration the appellants had pleaded guilty and thereby saved time and costs as the prosecution had intended to call about 20 witnesses and the defence, about seven (see para 10).

(2) Consideration was also given to the appellants' ages at the time of the offence, that they were first offenders, that they came from poor family backgrounds and had no proper education, that they were fishermen whose incomes depended on the 'catch' of the day and that they had co-operated with police since their arrest which allowed investigations to be completed expeditiously (see paras 10–12).

(3) The appellants' mitigation was also taken into account: that they regretted committing the offence and wanted to turn over a new leaf, that they never intended to kill but only to injure the deceased, that they had caused hardship and pain to the deceased's parents and members of his family and also to the appellants' own parents and family members and that they had learnt a bitter lesson (see para 13).

(4) Although the second appellant delivered the death blow it did not follow that the degree of culpability of each of the appellants should be different and that there should be a disparity in the sentences. All four appellants played active roles in assaulting the deceased. In the context of s 34 of the Penal Code all of them were accountable for the death of the deceased (see paras 14 & 16).

[Editorial note: The first and third appellants have appealed to the Federal Court against the Court of Appeal's decision on their sentence (see para 5)]

**[Bahasa Malaysia summary**

Keempat-empat perayu, yang pada asalnya dituduh dengan membunuh, telah mengaku salah di Mahkamah Tinggi dalam satu tuduhan terpinda kerana homisid salah yang tidak menjumlahkan kepada pembunuhan dengan menyebabkan kematian seorang lelaki. Mahkamah menjatuhkan hukuman 18 tahun penjara ke atas perayu pertama, ketiga dan keempat dan 10 tahun penjara ke atas perayu kedua, seorang pesalah kanak-kanak. Perayu kedua juga diperintahkan untuk diasingkan daripada banduan-banduan dewasa berikutan s 96(3) Akta Kanak-Kanak 2001. Perayu-perayu merasakan hukuman mereka berlebihan dan merayu ke Mahkamah Rayuan untuk pengurangan. Menurut fakta kes, perayu-perayu, pada malam berkenaan, telah mengambil alkohol dan terlibat dalam pergaduhan antara kumpulan. Mereka menyangkakan bahawa, secara silap, si mati dan dua orang rakannya, yang mengambil jalan pintas melalui sebuah kampung, dalam perjalanan pulang mereka ke rumah adalah kumpulan lawan yang telah menyerang perayu-perayu pada awalnya. Bersenjatakan sebatang kayu setiap seorang, perayu-perayu menyerang si mati dan rakan-rakannya. Hanya rakan-rakan si mati yang berjaya melarikan diri. Perayu-perayu meneruskan dan memukul si mati hingga cedera. Perayu kedua memberikan pukulan maut di kepala si mati. Pada ketika serangan itu, umur-umur perayu pertama hingga keempat masing-masing adalah 18 1/2 tahun, 16 tahun 11 bulan, 19 1/2 tahun dan 23 tahun 3 bulan.

**Diputuskan**, membenarkan rayuan, mengurangkan hukuman-hukuman ke atas perayu-perayu pertama, ketiga dan keempat kepada 15 tahun penjara dari tarikh penangkapan, mengurangkan hukuman perayu kedua kepada lapan tahun penjara dari tarikh penangkapan dan mengesahkan perintah Mahkamah Tinggi bahawa dia diasingkan daripada banduan-banduan dewasa:

(1) Mahkamah mengambilkira perayu-perayu yang mengaku bersalah dan dengan itu menjimatkan masa dan kos kerana pihak pendakwaan bercadang memanggil 20 orang saksi dan pembelaan, lebih kurang tujuh (lihat perenggan 10).

(2) Pertimbangan juga diberikan kepada umur perayu-perayu ketika kesalahan, bahawa mereka adalah pesalah pertama; bahawa mereka datang daripada latar belakang keluarga miskin dan tidak mempunyai pendidikan; bahawa mereka adalah nelayan yang pendapatannya bergantungan pada 'tangkapan' hari itu; dan bahawa mereka telah berkerjasama dengan polis sejak penangkapan yang membenarkan penyiasatan dilengkapkan dengan segera (lihat perenggan 10–12).

(3) Mitigasi perayu-perayu juga diambilkira; bahawa mereka menyesal melakukan kesalahan dan mahu berubah; bahawa mereka tidak bermaksud untuk membunuh hanya untuk mencederakan si mati; bahawa mereka telah menyebabkan kesusahan dan kesedihan kepada ibu bapa si mati dan ahli keluarganya dan juga kepada ibu bapa perayu-perayu sendiri dan ahli keluarga mereka dan mereka telah menerima pengajarannya (lihat perenggan 13).

(4) Walaupun perayu kedua telah memberikan pukulan maut, ia tidak mengikuti bahawa tahap kebersalahan setiap perayu mestilah berlainan dan bahawa mesti terdapat ketidakseimbangan dalam hukuman. Keempat-empat perayu memainkan peranan aktif dalam menyerang si mati. Dalam konteks s 34 Kanun Keseksaan, kesemua mereka adalah bertanggungan bagi kematian si mati (lihat perenggan 14 & 16).]

**Notes**

For cases on appeal against sentence, see 5(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 3553–3615.

**Cases referred to**

*(1) Namasiyiam (2) Rajindran (3) Goh Chin Peng, and (4) Ng Ah Kiat v PP* [1987] 2 MLJ 336, SC (refd)

*Abdul Karim v Regina; Sundra Singh v Regina; Loh Kai Hoi v Regina* [1954] MLJ 86 (refd)

*Abu Bakar bin Alif v R* [1953] MLJ 19 (folld)

*Chew Cheng Lye v Reg* [1956] MLJ 240 (refd)

*Christopher Khoo Ewe Cheng v PP* [1998] 3 MLJ 881; [1998] 3 AMR 3080, CA (refd)

*Dato Mokhtar Hashim & Anor v PP* [1983] 2 MLJ 232, FC (refd)
*Fu Foo Tong & Ors v PP* [1995] 1 SLR 448, CA (refd)
*Hari Om v State of UP* [1993] Cri LJ 1383 (refd)
*Ibrahim bin Masod & Anor v PP* [1993] 3 SLR 873, CA (refd)
*Irwan b Abdullah & 38 Lagi v Pendakwa Raya* [2002] 2 MLJ 577; [2002] 2 AMR 2174; [2002] 3 CLJ 151, HC (folld)
*Isa bin Che Noh & Ors v PP* [1956] MLJ 93 (refd)
*Ismail Rasid v PP* [1999] 4 CLJ 402; [1999] 4 AMR 4541, HC (refd)
*Joginder Singh v State of Haryana* AIR 1994 SC 461 (refd)
*Jumari bin Mohamed v PP* [1982] 1 MLJ 282 (refd)
*Kamaruzaman Mat Hassan & Anor v PP* [1997] 5 CLJ 279, HC (refd)
*Kenneth John Ball* (1951) 35 Cr App R 164 (refd)
*Kesavan Baskaran v PP* [2008] 6 MLJ 384; [2008] 6 CLJ 390, CA (refd)
*Kripal and others v State of Uttar Pradesh* AIR 1954 SC 706 (refd)
*Krishna Govind Patil v State of Maharashtra* AIR 1963 SC 1413 (refd)
*Lee Yoon Choy & Ors v PP* [1948–1949] Supp MLJ 167, CA (refd)
*Liow Siow Long v PP* [1970] 1 MLJ 40 (refd)
*Mahbub Shah v King Emperor* (1945) LR Vol LXXII Indian Appeals 148 (refd)
*Melvani v PP* [1971] 1 MLJ 137 (refd)
*Mohamed Abdullah Ang Swee Kang v PP* [1988] 1 MLJ 167, SC (refd)
*Mohamed Jusoh bin Abdullah And Another vs PP* [1947] MLJ 130, CA (refd)
*Muhamad Safarudin Baba & Anor v PP* [2002] 4 MLJ 353; [2002] 4 CLJ 210, CA (refd)
*Pandurang and others v State of Hyderabad* AIR 1955 SC 216 (refd)
*PP v Ayyavoo a/l Subramaniam & Anor* [2004] 6 MLJ 511, HC (refd)
*PP v Dato' Seri Anwar bin Ibrahim (No 3)* [1999] 2 MLJ 1; [1999] 2 CLJ 215; [1999] 2 AMR 2017, HC (refd)
*PP v Govindnan Chinden Nair* [1998] 2 MLJ 181; [1998] 2 CLJ 370, HC (refd)
*PP v Jafa bin Daud* [1981] 1 MLJ 315 (refd)
*PP v Lim Swee Guan* [1969] 1 MLJ 84 (folld)
*PP v Loo Choon Fatt* [1976] 2 MLJ 256 (folld)
*PP v Mohamad Ramly* [1974] 1 MLJ 95 (refd)
*PP v Nazarudin bin Ahmad & Ors* [1993] 2 MLJ 9, HC (refd)
*PP v Roslan bin Imun* [1999] 3 MLJ 659; [1999] 3 CLJ 494; [1999] 3 AMR 3706, HC (refd)
*PP v Safian Abdullah & Anor* [1983] CLJ (Rep) 804, HC (refd)
*PP v Sharithan a/l Pachemuthu* [2000] 5 MLJ 368; [1999] 4 AMR 4619; [2000] 5 CLJ 15, HC (refd)
*PP v Sulaiman bin Ahmad* [1993] 1 MLJ 74, HC (refd)
*PP v Tan Chee Seng & Ors* [2004] 1 MLJ 392, HC (refd)
*PP v Tengku Mahmood Iskandar & Anor* [1973] 1 MLJ 128 (refd)
*R v Alcock and Others* [1967] Crim LR 66 (refd)
*R v Bishop* [2000] Cr LR 60 (refd)
*R v Fearon* [1996] 2 Cr App R (S) 25 (refd)

*R v Searle and Others* [1971] Crim LR 592 (refd)
*R v William Henry Boyd* (1980) 2 Cr App R (S) 234 (refd)
*Raja Izzuddin Shah v PP* [1979] 1 MLJ 270 (refd)
*Reg v J H Sargeant* (1975) 60 Cr App R 74 (refd)
*Rosli bin Supardi v PP* [2002] 3 MLJ 256, CA (refd)
*Sau Soo Kim v PP* [1975] 2 MLJ 134, FC (refd)
*Taib bin Gemok v PP* [1984] 1 MLJ 313 (refd)
*Tan Koon Swan v PP* [1987] 2 MLJ 129; [1986] SLR 126, CA (refd)
*Tan Sri Abdul Rahim bin Mohd Noor v PP* [2001] 3 MLJ 1; [2001] 4 CLJ 9; [2001] 3 AMR 3253, CA (folld)
*Tansley v Painter* [1969] Crim LR 139 (refd)
*Vennel & Ors v PP* [1985] 1 MLJ 459, CA (refd)
*Wong Yuk Ai v PP* [1966] 2 MLJ 51 (refd)
*Zaidon Shariff v PP* [1996] 4 CLJ 441, HC (refd)

**Legislation referred to**

Child Act 2001 ss 76, 96(3)
Penal Code ss 34, 302, 304(a)

**Appeal from:** Criminal Trial No A5–2–2008–II (SG) (High Court, Sri Aman)

*Cheng Hui Hong (Cheng & Cheng Advocates) for the first to fourth appellants.*
*Iswa bt Tonie (Deputy Public Prosecutor, Attorney General's Chambers) for the prosecution.*

**Abdul Malik Ishak JCA (delivering judgment of the court):**

INTRODUCTION

**[1]** Initially, all the four appellants were jointly charged for an offence of murder under s 302 of the Penal Code read together with s 34 of the same Code and if they were found guilty they would be sentenced to death. They were quite lucky. The prosecution decided to reduce the charge. An amended charge under s 304(a) of the Penal Code read with s 34 of the same Code was tendered. By this amended charge, the appellants were jointly charged for committing culpable homicide not amounting to murder by causing the death of Kaderi bin Noh on 18 April 2008 at about 11pm in front of the mosque at Kampung Tengah Beladin, Pusa, in the district of Sri Aman, Sarawak.

**[2]** All the four appellants pleaded guilty to the amended charge and the learned judicial commissioner ('JC') convicted and sentenced them accordingly. In regard to the first, third and fourth appellants, the learned JC sentenced each of them to 18 years imprisonment with effect from the date of their arrest and that was on 19 April 2008. In regard to the second appellant, a child offender, the learned JC sentenced him to ten years imprisonment with

effect from the date of his arrest and that was on 19 April 2008 and Her Ladyship also ordered that the second appellant be segregated from the adult prisoners pursuant to s 96(3) of the Child Act 2001 (Act 611).

**[3]** Aggrieved by the sentences imposed on them, all the four appellants appealed to this court. They complained that the sentences were grossly excessive.

**[4]** We anxiously heard their appeals and we substituted their sentences in this manner. In regard to the first, third and fourth appellants, we sentenced each of them to 15 years imprisonment with effect from the date of their arrest and that would be on 19 April 2008. And in regard to the second appellant, a child offender, we sentenced him to eight years imprisonment from the date of his arrest and that would be on 19 April 2008. We also made an order that the second appellant being a child offender be segregated from the other adult prisoners by virtue of s 96(3) of the Child Act 2001 (Act 611).

**[5]** It is apparent that we have reduced their sentences to suit the facts and circumstances of the case and after carefully considering the principles of sentencing relevant to the four appellants. We shall say more about this later. They are still unhappy with the sentences meted out by us. They are now appealing to the Federal Court (for the first appellant, Muhammad Isa bin Aris, Federal Court Criminal Case No 05–159 of 2010(Q) and for the third appellant, Mohd Ruzaini bin Annuar, Federal Court Criminal Case No 05–160 of 2010(Q)).

THE FACTUAL MATRIX

**[6]** On that fateful night, the deceased and two of his friends were on their way home after they had their drinks at the wharf at Kampung Hulu. They took a short cut via Kampung Tengah Beladin in order to return home at Kampung Hilir.

**[7]** On arrival at Kampung Tengah Beladin, they were surrounded by the four appellants who were armed with a piece of wood each. The four appellants then chased the deceased and his two friends. The deceased's two friends managed to reach home safely.

**[8]** But, unfortunately, the deceased could not escape and he was mercilessly beaten by all the four appellants. The first appellant used a piece of wood to hit the back portion of the deceased while the second appellant, a child offender, bashed the deceased's head with a piece of wood. A short while later, the third and the fourth appellants joined in the affray and they each assaulted the deceased with a piece of wood which they carried separately. Using a piece of

wood, the third appellant whacked the back torso of the deceased. The fourth appellant too assaulted the deceased on the same spot with a piece of wood and he too kicked the deceased.

**[9]** Investigations revealed that all the four appellants had consumed alcohol and they were involved in a gang fight and that they were under the impression that the deceased was from a rival gang who had attacked them earlier on. Investigations also revealed that all the four appellants had pursued the deceased and had mercilessly beaten him to death. The pathologist confirmed that the cause of death was due to the blunt force trauma on the deceased's head.

THE REASONS FOR THE REDUCED SENTENCES

**[10]** We have deliberated at great length and we have reduced their sentences. We took into consideration the following factors:

(a) that the original charge of murder was reduced by the prosecution to a charge of culpable homicide not amounting to murder and on this reduced charge they pleaded guilty (*Melvani v Public Prosecutor* [1971] 1 MLJ 137) thereby saving precious time and costs bearing in mind that the prosecution had indicated that they would call approximately 20 witnesses and the defence would call approximately seven witnesses (see p 9 of the appeal record);

(b) that they were all first offenders with clean records (*Public Prosecutor v Jafa bin Daud* [1981] 1 MLJ 315);

(c) that at the time of the commission of the offence, their ages were in this order;

  (i) the first appellant was 18 years six months and three days old;

  (ii) the second appellant, a child offender, was 16 years 11 months and 27 days old;

  (iii) the third appellant was 19 years six months and 21 days old; and

  (iv) the fourth appellant was 23 years 3 months and eight days old.

(d) that they all came from poor family backgrounds and had no proper education:

  (i) the first appellant attended school up to primary six at Sekolah Kebangsaan Beladin;

  (ii) the second appellant, a child offender, did not go to school at all;

  (iii) the third appellant attended school up to Form 5 at Sekolah Menengah Kebangsaan Santubong; and

(iv) the fourth appellant attended school up to primary six at Sekolah Kebangsaan Beladin.

**[11]** We also considered the probation reports prepared by En Norazman bin Abdul Rahim from the welfare office at Kuching, Sarawak dated 14 May 2009. The probation reports on all the four appellants indicated that they were fishermen by profession and that their incomes were not fixed and dependent on the 'catch' of the day.

**[12]** We also took into account the fact that all the four appellants had cooperated with the police ever since they were arrested on 19 April 2008 and this greatly assisted the police¦ to complete their investigations expeditiously.

**[13]** We were at pains to consider the mitigation advanced by learned counsel on behalf of the four appellants. We noted that:

(a) they have learnt a bitter lesson;

(b) they have caused hardship to their parents and other family members;

(c) they have also caused hardship and pain to the deceased's parents and members of the deceased's family;

(d) they regretted for what they had done and they are desirous of turning over a new leaf and lead normal lives after undergoing their prison terms; and

(e) they had no intention to kill the deceased but they merely intended to cause injury.

**[14]** It is said that the degree of culpability for each of the four appellants should be different and that there should be a disparity in the sentences (*Public Prosecutor v Tan Chee Seng & Ors* [2004] 1 MLJ 392). Here, on the facts, it was the second appellant — the child offender, who bashed the deceased's head with a piece of wood. And the injury to the head was the cause of the death of the deceased. Thus, the severity of the sentence should be borne by the second appellant — the child offender, and not the other three appellants. However, the reduced charge invoked s 34 of the Penal Code. What this amounts to is this. It is statutorily recognised that if more than two persons intentionally commit a crime together it is as if each of them had committed the crime individually. It falls squarely within the concept of joint liability in committing the criminal offence based on common intention. Thus, an individual accused person is held to be responsible for the criminal acts done by several persons in furtherance of the common intention of all irrespective of the role played by each accused person in the perpetration of the offence. It is a question of fact in every case in order to determine the existence of common intention. Section 34

of the Penal Code would bite even if the wrongdoer is absent from the scene of the crime (*Ibrahim bin Masod & Anor v Public Prosecutor* [1993] 3 SLR 873, (CA)).

**[15]** It is correct to say that in order to invoke s 34 of the Penal Code against all the four appellants, concert pursuant to a pre-arranged plan has to be established either by way of direct evidence or by way of inference from the surrounding circumstances and that the criminal act complained of must have been done by one of the four appellants in furtherance of the common intention of them all (*Mahbub Shah v King Emperor* (1945) LR Vol LXXII Indian Appeals 148; *Joginder Singh v State of Haryana* AIR 1994 SC 461; *Pandurang and others v State of Hyderabad* AIR 1955 SC 216; *Kripal and others v State of Uttar Pradesh* AIR 1954 SC 706; *Lee Yoon Choy & 2 Others v Public Prosecutor* [1949] MLJ 66; *Dato Mokhtar Hashim & Anor v Public Prosecutor* [1983] 2 MLJ 232 (FC), at p 265; *Isa bin Che Noh & Ors v Public Prosecutor* [1956] MLJ 93; *Chew Cheng Lye v Reg* [1956] MLJ 240 at p 241; *Tansley v Painter* [1969] Crim LR 139; *R v Searle and Others* [1971] Crim LR 592 (CA); *(1) Namasiyiam (2) Rajindran (3) Goh Chin Peng, and (4) Ng Ah Kiat v Public Prosecutor* [1987] 2 MLJ 336 (SC) at p 344; *Kamaruzaman Mat Hassan & Anor v Public Prosecutor* [1997] 5 CLJ 279 at p 286; *Muhamad Safarudin Baba & Anor v Public Prosecutor* [2002] 4 CLJ 210, (CA) at p 222; and *Public Prosecutor v Ayyavoo a/l Subramaniam & Anor* [2004] 6 MLJ 511). It is also apt to say that common intention can also develop on the spur of the moment or on the spot (*Krishna Govind Patil v State of Maharashtra* AIR 1963 SC 1413; and *Hari Om v State of UP* 1993 Cri LJ 1383).

**[16]** Here, all the four appellants played active roles in assaulting the deceased. They must, in the context of s 34 of the Penal Code, be held accountable for the death of the deceased. Indeed they have pleaded guilty to the amended charge of culpable homicide not amounting to murder.

**[17]** A concerted submission was made on behalf of the second appellant, the child offender, based on the probation report that he should be sent to the Henry Gurney school until he reaches the age of 21 pursuant to s 76 of the Child Act 2001 (Act 611). We declined to do so. Instead we reduced his sentence and we sentenced him to eight years imprisonment from the date of his arrest (19 April 2008) and we ordered that he be segregated from the other adult prisoners by virtue of s 96(3) of the Child Act 2001(Act 611). We noted that although the second appellant is a child offender at the time of committing the offence yet it was he who bashed the deceased's head with a piece of wood. The fatal blow was delivered by the second appellant — the child offender. The head is a vital part of the human body. Any injury to the head is almost always disastrous.

**[18]** It is not easy to sentence an accused person appropriately benefitting the nature and circumstances of the offence. But an accused person who chooses to commit a crime must be held accountable and be responsible for the resulting evil and he deserves to be punished. The sentence meted out should adequately reflect the revulsion of the citizens for the particular crime committed. The purpose of sentencing is seen not only as a punishment to the accused person, it is also seen as a public denunciation of the criminal act in question.

**[19]** The sentence meted out must be proportionate to the offence. It is often said that the business of the court is to do justice and this can be achieved if the sentence is proportionate between one offender to that of another.

**[20]** Public interest features prominently in sentencing an accused person. Indeed this is the approach adopted by this court in *Tan Sri Abdul Rahim bin Mohd Noor v Public Prosecutor* [2001] 3 MLJ 1; [2001] 4 CLJ 9 at p 13; [2001] 3 AMR 3253 at p 3257 at p 4, where Shaik Daud JCA had this to say:

> It cannot be gainsaid that the most onerous function of any court is to decide the appropriate sentence in any criminal case. In deciding the appropriate sentence a court should always be guided by certain considerations. The first and foremost is the public interest. In that context the interest of justice should no doubt take into account the interest of the offender. But it is often forgotten that the interest of justice must also include the interest of the community. In assessing sentence the court should balance the interest of the offender with the interest of the victim and strike a balance, not, of course forgetting that the interest of the public should be of the uppermost consideration.

**[21]** What Hilbery J said in *Kenneth John Ball* (1951) 35 CrApp R 164 is still accepted and adopted as good law. This was what His Lordship said at p 166:

> Our law does not, therefore, fix the sentence for a particular crime, but fixes a maximum sentence and leaves it to the court to decide what is, within that maximum, the appropriate sentence for each criminal in the particular circumstances of each case. Not only in regard to each crime, but in regard to each criminal, the court has the right and the duty to decide whether to be lenient or severe.

**[22]** And this simple proposition of the law has been dutifully followed in the following cases:

(a) *Abu Bakar bin Alif v R* [1953] 19 MLJ 19;

(b) *Public Prosecutor v Lim Swee Guan* [1969] 1 MLJ 84;

(c) *Public Prosecutor v Loo Choon Fatt* [1976] 2 MLJ 256;

(d) *Public Prosecutor v Nazarudin bin Ahmad & Ors* [1993] 2 MLJ 9; [1993] 2 CLJ 543; and

(e) *Irwan b Abdullah & 38 Lagi v Pendakwa Raya* [2002] 2 MLJ 577; [2002] 2 AMR 2174; [2002] 3 CLJ 151.

**[23]** A sentence imposed must always relate to the facts and circumstances of the case. The sentencing judge must always take into account and apply his mind to the factual matrix of the case (*Abdul Karim v Regina; Sundra Singh v Regina; Loh Kai Hoi v Regina* [1954] MLJ 86).

**[24]** It is ideal to recognise that no two cases are alike. And that the facts must necessarily vary from case to case and, at the end of the day, each case has to be decided on its own merits (*Tan Koon Swan v Public Prosecutor* [1987] 2 MLJ 129; [1986] SLR 126 (CA) at p 130, (CCA) (Singapore)).

**[25]** In *Liow Siow Long v Public Prosecutor* [1970] 1 MLJ 40, Raja Azlan Shah J (as His Royal Highness then was) aptly said at p 42:

> It is not in doubt that the right measure of punishment for an offence is a matter in which no hard and fast rules can be laid down and it is to be determined by a consideration of a variety of circumstances. In assessing sentence, the primary consideration is the character and magnitude of the offence, but the court cannot lose sight of the proportion which must be maintained between the offence and the penalty and the extenuating circumstances which might exist in the case.

**[26]** We must emphasise that in reducing the sentences on all the four appellants here, we have considered the mitigation plea advanced by learned counsel. The importance of a mitigation plea cannot be denied. It's importance was announced by Hilbery J in *Kenneth John Ball* in these erudite terms (see p 166 of the report):

> It is for these reasons, and with these purposes in view, that before passing sentence the court hears evidence of the antecedents and character of every convicted person. It follows that when two persons are convicted together of a crime or series of crimes in which they have been acting in concert, it may be right, and very often is right, to discriminate between the two and to be lenient to the one and not to the other. The background, antecedents and character of the one and his whole bearing in court may indicate a chance of reform if leniency is extended, whereas it may seem that only a harsh lesson is likely to make the other stop in his criminal career. The argument that a severe sentence on one prisoner must be unjust because his fellow prisoner, who was convicted of the same crime, received a light sentence or none at all, has neither validity nor force. The differentiation in treatment is justified if the court, in considering the public interest, has regard to the differences in the characters and antecedents of the two convicted men and discriminates between them because of those differences.

**[27]** Hashim Yeop A Sani J (later the Chief Judge of Malaya) in *Raja Izzuddin Shah v Public Prosecutor* [1979] 1 MLJ 270, aptly said in regard to the value of a plea in mitigation in these salient words:

> No plea in mitigation should be thrown aside lightly but must be examined and considered equally with the facts presented by the prosecution. Both aspects of the case must be considered in their true perspective so as to strike if possible, a true balance in the scale of justice.

**[28]** The reluctance of an accused person to advance a plea in mitigation must be construed as a reflection of his absence of remorse *(Public Prosecutor v Dato' Seri Anwar bin Ibrahim (No 3)* [1999] 2 CLJ 215; [1999] 2 AMR 2017; [1999] 2 MLJ 1).

**[29]** As demonstrated, we have considered the personal culpability of each of the four appellants, the social conditions in which the offence was committed and the public interest involved. When we say that every sentence must be in the public interest, we meant that it must have reference to established sentencing goals or aims.

**[30]** The classical sentencing goals or aims are aptly set out in *Reg v J H Sargeant* (1975) 60 Cr App R 74 at pp 77–78, (CA) by Lawton LJ. There His Lordship alluded to retribution, deterrence, prevention and rehabilitation

**[31]** Two aspects to the principle of retribution must be highlighted. The first concerns punishment. The second concerns denunciation. Punishment connotes punishing the offender for the crime which he commits. While denunciation refers to the announcement that the behaviour of the offender is unacceptable to society.

**[32]** Deterrence too may be categorised into two aspects. The first relates to general deterrence. While the second refers to specific deterrence. General deterrence is for the purpose of deterring the general public at large. Specific deterrence is to ensure that the offender in question does not break the law again.

**[33]** Prevention relates to preventing the offender from committing the crime again by putting him away for an appropriate length of time. In this way the offender is given the opportunity to reflect and ponder about his misdeeds.

**[34]** According to Norval Morris and Frank Zimring, *'Deterrence and Corrections'*, *The Annals of the American Academy of Political and Social Science*, January 1969, 381: 137-146, at pp 137–138:

> Society has developed a large and diverse vocabulary of motives for punishment; punishment is justified as a means of expressing society's retributive feelings as a method of inculcating respect for law and order and as a method of isolating high crime risks as a deterrent and as a mechanism for rehabilitation.

**[35]** Two maxims must be put to the forefront. The first is *Nullum crimen, sine lege*. The second is *Nulla poena sine lege.* It means this. That the law alone determines and defines an offence. The law alone decrees the penalty. A penalty cannot be inflicted in a given case if it is not decreed by the law in respect of that case.

**[36]** We are reminded of the speech of Mohamed Azmi J (later SCJ) in the case of *Jumari bin Mohamed v Public Prosecutor* [1982] 1 MLJ 282, at p 284. There His Lordship had this to say:

> For the purpose of doing substantial justice, the court must bear in mind that justice must be done not only to the convicted person but also to society at large on whose behalf the Public Prosecutor acts.

**[37]** In *Taib bin Gemok v Public Prosecutor* [1984] 1 MLJ 313, Justice Rhind had this to say about sentencing (see p 315 of the report):

> The modern tendency in sentencing, as I understand it, is not to try to fill the jails at every conceivable opportunity, but only to send people to prison where this is essential in the interest of society.

**[38]** We are constrained to hold that it 'is essential in the interest of society' that all the four appellants be put behind bars for a considerable period of time.

**[39]** In *Sau Soo Kim v Public Prosecutor* [1975] 2 MLJ 134, (FC), at p 137, Lee Hun Hoe CJ (Borneo) had this to say:

> Whether a person is a hardened criminal or not, I feel that a plea of guilty should be treated as a mitigating factor. It not only saves the country a great expense of a lengthy trial but also saves time and inconvenience of many, particularly the witnesses.

**[40]** We gratefully adopt what His Lordship had said. Indeed we have taken into account the fact that all the four appellants had pleaded guilty to the amended charge of culpable homicide not amounting to murder. We also noted that pleading guilty had saved time and costs.

**[41]** There is certainly no fixed mathematical formula as to how to impose the appropriate sentence on an offender. Much would depend on the facts and

circumstances of the case. Indeed this was what Willan CJ had said in the case of *Mohamed Jusoh bin Abdullah And Another vs Public Prosecutor* [1947] MLJ 130, at p 131:

> In our view no sentence can be assessed by a simple mathematical formula. Many factors must be taken into account according to the circumstances of each individual case. In that respect we would draw attention to the matters which should be taken into account in fixing punishments as set out in *Halsbury's Laws of England* (Hailsham Edition) Vol 9, para 365:
>
> 'The Court, in fixing the punishment for any particular crime, will take into consideration the nature of the offence, the circumstances in which it was committed, the degree of deliberation shown by the offender, the provocation which he has received, if the crime is one of violence, the antecedents of the prisoner up to the time of sentence, his age and character'.

**[42]** And the same point was further stressed by Brown Acting CJ in *Abdul Karim v Regina*; *Sundra Singh v Regina*; *Loh Kai Hoi v Regina* at p 86:

> In the matter of punishment, the 'type of offence' is the concern of the Legislature, which has provided the maximum punishment which can be inflicted for a serious offence of that type. The particular offence, and the particular offender, are the concern of the court, whose business it is to decide what punishment is merited upon the facts of the individual case within the limits which the Legislature has provided. Any tendency to standardise punishment for any type of offence is to be deplored because it means that the individual offender is being punished not upon the facts of his particular case but because he has committed an offence of that type.

**[43]** In determining the length of the custodial sentence in cases where the accused person has pleaded guilty, the speech of Cumming-Bruce LJ in *R v William Henry Boyd* (1980) 2 Cr App R (S) 234, (CA) must be referred to. There His Lordship aptly said at p 235:

> The policy of the courts is that where a man does plead guilty, which does give rise to public advantage and avoids the expense and nuisance of a trial, which may sometimes be a long one, the court encourages pleas of guilty by knocking something off the sentence which would have been imposed if there had not been a plea of guilty.

**[44]** It is ideal to consider the plea of guilty as a mitigating factor in the assessment of the appropriate sentence. But the weight of the plea of guilty must be dependent on the other factors that would be made known to the court at the time of sentencing (*Melvani v Public Prosecutor*).

**[45]** We are aware that a plea of guilty can be taken by us as a sure sign of remorse (*Wong Yuk Ai v Public Prosecutor* [1966] 2 MLJ 51; *R v Alcock and Others* [1967] Crim LR 66; and *Vennel & Ors v Public Prosecutor* [1985] 1 MLJ 459, (CA)). A

**[46]** We are also aware that the failure to consider the plea of guilty may give rise to appellate intervention and where there is no explanation for such failure it may amount to a misdirection (*R v Fearon* [1996] 2 Cr App R (S) 25; and *R v Bishop* [2000] Cr LR 60 (CA). B

**[47]** There is always the advantage of pleading guilty. Discounts would be given and it would be between one-quarter and one-third of what otherwise would have been the sentence (*Mohamed Abdullah Ang Swee Kang v Public Prosecutor* [1988] 1 MLJ 167, at p 171, (SC); *Christopher Khoo Ewe Cheng v Public Prosecutor* [1998] 3 MLJ 881, (CA); [1998] 3 AMR 3080, (CA); *Public Prosecutor v Nazarudin bin Ahmad & Ors* [1993] 2 MLJ 9; and *Public Prosecutor v Sharithan a/l Pachemuthu* [2000] 5 MLJ 368; [1999] 4 AMR 4619; [2000] 5 CLJ 15. C D

**[48]** For an offence under s 304(a) of the Penal Code, the term of imprisonment may extend to 30 years, and shall also be liable to a fine. This amendment came into force on 6 March 2007. Here, the offence was committed on 18 April 2008. One-quarter of 30 years imprisonment would approximately be 22 1/2 years imprisonment. While one-third of 30 years imprisonment would approximately be 20 years imprisonment. It is obvious that the sentences imposed by the learned JC on all the four appellants had been discounted in excess of the permissible level. We further reduced the sentences and gave hefty discounts. We are indeed magnanimous. E F

**[49]** In *Public Prosecutor v Roslan bin Imun* [1999] 3 MLJ 659; [1999] 3 CLJ 494; [1999] 3 AMR 3706, Abdul Malik bin Ishak J sitting at the High Court refused to give a discount to the accused who had pleaded guilty to an offence of causing grievous hurt by shoving a 60cm stick up the anus of a young boy. His Lordship held that the heinous nature of the despicable crime, the high degree of violence and the need to protect the country's young citizens from the accused who had a previous conviction for culpable homicide did not justify a discount to be given to the accused. His Lordship further held that 'there was no redeeming feature in favour of the accused'. G H

**[50]** Be that as it may, it is not always the case that a guilty plea ought to be considered automatically in favour of the accused. The prevailing factors and the circumstances surrounding the commission of the offence would determine and ultimately justify the court to consider the guilty plea in favour of the accused (*Ismail Rasid v Public Prosecutor* [1999] 4 CLJ 402; [1999] 4 I

AMR 4541,; *Zaidon Shariff v Public Prosecutor* [1996] 4 CLJ 441; and *Public Prosecutor v Govindnan Chinden N air* [1998] 2 CLJ 370; [1998] 2 MLJ 181; *Fu Foo Tong & Ors v Public Prosecutor* [1995] 1 SLR 448, (CA); and *Kesavan Baskaran v Public Prosecutor* [2008] 6 CLJ 390, (CA)).

**[51]** The sentence meted out must reflect the gravity of the offence. The court cannot remain idle but must rise up to the occasion. In *Public Prosecutor v Tengku Mahmood Iskandar & Anor* [1973] 1 MLJ 128, at p 129, Raja Azlan Shah J (as His Royal Highness then was) aptly said:

> It is well settled that the sentence must reflect the gravity of the offence. In the present case it is not so much the triviality of the injury but the circumstances culminating in the commission of the offence which are of importance.

**[52]** Gopal Sri Ram JCA (later FCJ) speaking for this court in *Rosli bin Supardi v Public Prosecutor* [2002] 3 MLJ 256 (CA) at p 263 expressed dissatisfaction with the inadequate sentence passed on the appellant:

> The sentence imposed does not even attempt to meet the public interest nor does it have any relation to the aggravated circumstances in which the offence was committed. We would be plainly falling in out duty, to our conscience and to the public if we did not interfere in this case. Having regard to the facts and the circumstances of the appellant's case and giving public interest the weight it deserves, we are satisfied that the sentence passed is manifestly inadequate, we would therefore, take these considerations into account and the other circumstances advanced in plea of mitigation before the sessions court, we would set aside the sentence of six years and substitute in place with 12 years' imprisonment from 30 September 1994 (date of arrest). We would also set aside the sentence of three strokes of the rotan and substitute in place with five strokes. The orders of the sessions court are altered to this effect.

**[53]** Wan Yahya J (later SCJ) in *Public Prosecutor v Safian Abdullah & Anor* [1983] CLJ (Rep) 804 at p 807, spoke about the propensity of the two accused persons aged 20 and 21 years at the time of committing the offence and who had pleaded guilty to an amended charge of culpable homicide not amounting to murder under s 304 of the Penal Code and this was what His Lordship said:

> In my opinion these two accused, in spite of their ages, are dangerous young criminals of aggressive propensity. Unless they are properly reformed they will continue to be a serious menace to society. A sufficiently long period of detention will be required for their correction, reformation and rehabilitation before they can be allowed to return to society.

**[54]** The public interest considerations highlighted by Hilbery J in *Kenneth John Ball* must necessarily vary, 'according to the time, place and circumstances

of each case including its nature and prevalence. Therefore, what is deemed to be of public interest in one place may not be so in another. In short, the concept of public interest is very fluid' (per Abdul Malik bin Ishak J in *Public Prosecutor v Sulaiman bin Ahmad* [1993] 1 MLJ 74, 77 ).

**[55]** Mohamed Azmi J (later SCJ) in *Public Prosecutor v Mohamad Ramly* [1974] 1 MLJ 95 at p 96 held that, 'In assessing sentence, a proper balance should be struck between public interest and the interest of the accused'.

**[56]** We have considered all the authorities mentioned in this judgment together with the facts and circumstances surrounding the death of the deceased before we reduced the sentences in favour of all the four appellants. All the mitigating factors operating in their favour were painstakingly considered by us. We have accordingly reduced the sentences imposed by the learned JC and these sentences were reduced according to the prevailing law. It must be emphasised that the amended s 304(a) of the Penal Code that comes into effect from 6 March 2007 carries with it a term of imprisonment which may extend to 30 years, and shall also be liable to a fine. In the circumstances, we have been very lenient.

*Appeals allowed, sentences of the first, third and fourth appellants reduced to 15 years jail from date of arrest, second appellant's sentence reduced to 8 years jail from date of arrest and High Court's order maintained that he be segregated from other adult prisoners.*

Reported by Ashok Kumar